Before the
COPYRIGHT ARBITRATION ROYALTY PANELS
Library of Congress

In the Matter of	)	
	)	Docket No. 96-6
Adjustment of the Rates for	)	CARP NCBRA
Noncommercial Educational	)	
Broadcasting Compulsory License	)	

POST-HEARING PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE PUBLIC BROADCASTING SERVICE AND NATIONAL PUBLIC RADIO

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OVERVIEW

1. The Public Broadcasters, in their Proposed Findings of Fact and Conclusions of Law, addressed the parties' respective trial presentations and fee positions. In this Reply, we avoid repeating, except where context requires, the factual and legal contentions there set forth, and focus instead on responding to (a) certain legal arguments raised in the ASCAP and BMI post-trial submissions, and (b) those of ASCAP's and BMI's proposed factual findings which are material to this Panel's ruling and which have not already been completely responded to. We do not endeavor to address all of the legal argumentation or record characterizations mounted by the other side, however much we may disagree with much of it, where they have little bearing on the issues before the Panel. We likewise refrain from responding to ASCAP's penchant for the pejorative (e.g., "it was evident on cross-examination that [Professor Jaffe] had retained little of what he read . . ." ASCAP FF ¶ 288).

2. We had assumed, from Dr. Boyle's rebuttal testimony, that ASCAP had modified its original fee proposal

downward, from combined five-year fees totaling $39.91 million to $30 million. PB FF/CL ¶¶ 3 and 151-153 were so predicated. Review of ASCAP's post-hearing submission reveals that ASCAP in fact seeks its original fee levels (see ASCAP FF ¶ 78). This being so, it is appropriate to point out the following:

> a. ASCAP's proposed five-year fee of $39.91 million would represent a 167 percent increase over the parties' most recently-negotiated five-year fee.
>
> b. ASCAP's proposed fee for radio alone -- $16.85 million over five years -- would represent a thirteen percent increase over the license fee paid by public radio and public television combined during the 1993-1997 license period.
>
> c. When combined with BMI's proposed combined five-year fee of $34.475 million, the ASCAP/BMI fee proposals would garner an increase of ___ percent over the 1993-1997 fee level.

Why such an extraordinary increase is unwarranted is addressed in our prior submission and in this Reply.

I. THE GOVERNING LEGAL FRAMEWORK

A. Section 118 and Its Presumption That the Parties' Prior Agreements Are the Best Indicia of Fair Value

3. The parties fundamentally agree: that the task of this Panel is to set a "reasonable" fee for the performing rights in issue; that the concept of reasonableness normally entails assessing the fair market value of the rights involved; and that the most accepted

evidence of fair market value is the price which willing buyers and willing sellers place on the goods or services involved. PB FF/CL ¶¶ 12-16; ASCAP CL ¶¶ 8-10; BMI CL ¶¶ 206-207.[1]

4. ASCAP acknowledges, in addition, that the provisions of § 118(b) of the Act "demonstrate[] the clear legislative preference for voluntary agreement rather than administrative ratemaking under Section 118." ASCAP CL ¶ 5. Yet, although ASCAP has invoked, and received the benefits of, § 118(b) in the past, by repeatedly and enthusiastically entering into voluntary, arm's length agreements with the Public Broadcasters, it here urges that no weight be given those prior agreements, and that the Panel instead look to an entirely different marketplace, wholly outside of the framework of § 118, for evidence of fair market value.

5. ASCAP, it appears, would apply different presumptive rules as to BMI, concerning which it has previously (PB FF/CL ¶ 195) and now again (ASCAP FF ¶ 298) expressed the view that BMI's own prior voluntary agreements

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1. As used herein, "BMI FF" refers to BMI's Proposed Findings of Fact; "BMI CL" refers to BMI's Proposed Conclusions of Law; "ASCAP FF" refers to ASCAP's Proposed Findings of Fact; "ASCAP CL" refers to ASCAP's Proposed Conclusions of Law; "PB FF/CL" refers to Public Broadcasters' Proposed Findings of Fact and Conclusions of Law.

with the Public Broadcasters are plainly relevant guideposts to fee-setting here -- but solely as to BMI.

6. As earlier discussed, ASCAP's desired disparate treatment founders on the purported basis for distinction -- the no precedent language in the prior ASCAP agreements. See PB FF/CL ¶¶ 184-194. See also ¶¶ 48-51 infra. ASCAP's position is, in any event, unavailing given the economic logic and legal mandate to look to BMI's fee experience with the Public Broadcasters as an alternative basis for determining reasonable fees as to both organizations here.

7. The economic logic of extrapolating from the Public Broadcasters' prior BMI fee experience to the reasonable combined value of the ASCAP and BMI repertories has been already explained. See PB FF/CL ¶¶ 195-198.

8. As a legal matter, the court in the Showtime ASCAP rate proceeding expressly determined that, in a circumstance in which no suitable ASCAP license precedents with a given user exist, BMI's own experience with that user, adjusted for such factors as differing music use, is the next best indicium of a reasonable ASCAP fee. Showtime Second Circuit Opinion at 571; United States v. ASCAP; Application of Showtime/The Movie Channel, Inc., Mem. and

Order (S.D.N.Y., October 12, 1989), reprinted in 912 F.2d 563, 594-95 (2d Cir. 1990).

9. ASCAP cannot seriously be heard to protest use of the BMI fee experience to extrapolate to reasonable ASCAP fees. It is presently proposing just such a methodology in its New York rate court. See NCTA Brief at 4 ("There can be no doubt that the BMI agreement for the same uses of music is the most appropriate benchmark for setting an interim ASCAP fee.") (Appendix A to PB FF).

10. For its part, BMI concedes that "logic" and court precedent warrant examination of the parties' own prior license agreements. BMI CL ¶ 212. It seeks, however, to downplay the presumptive significance to the § 118 ratemaking process of such prior experience.

11. ASCAP's copyright law expert, Mr. Baumgarten, could not have been more emphatic as to the significance § 118 affords voluntary license agreements between the parties. Mr. Baumgarten testified that it is the "hallmark" of § 118 to encourage negotiations between the performing rights organizations and affected users; that negotiated agreements are "much the preferred model" of arriving at license fee outcomes; and that such arm's-length negotiations represent the best indicia of "fair value." See Baumgarten, Tr. at 445-46, 481-82.

12. The Library of Congress agrees. Negotiated outcomes under § 118(b) "inevitably afford[] fair compensation to all parties." Digital CARP Final Rule, 63 Fed. Reg. at 25,409.

13. Both ASCAP and BMI attempt to blunt the force of the foregoing by suggesting that § 118 is somehow "procedural" in nature only -- that it is even an impediment to the setting of reasonable fees. ASCAP CL ¶ 36; BMI FF ¶ 107. Quite to the contrary, as earlier discussed, § 118 embodies and implements "policy considerations which are not normally part of the calculus of a marketplace rate" and which reflect the "considerations underpinning the objectives of Congress in creating the license." See PB FF/CL ¶ 17 citing to Digital CARP Final Rule, 63 Fed. Reg. at 25,409. While ASCAP and BMI, understandably given the positions they espouse here, seek to move the locus of relevant license experience outside of the policy framework of § 118, § 118, its legislative history (as interpreted by ASCAP's own expert), and the Librarian's authoritative interpretation of that section of the Act all require rejection of such effort. See PB FF/CL ¶¶ 18-21.

14. BMI's further attempt to limit the precedential force to be given agreements reached under the auspices of § 118, by arguing that the words "[l]icense

agreements reached at any time" as they appear in § 118(b)(2) really do not mean what they plainly say, but instead contemplate consideration solely of agreements reached contemporaneously within the time period of an ongoing CARP proceeding (see BMI FF at n.17), defies plain English. It is, moreover, contrary to the common-sense interpretation which Mr. Baumgarten, who was at the time of enactment of § 118 the General Counsel of the Copyright Office, conceded to Judge Gulin these words bear. See Baumgarten, Tr. at 486.

15. ASCAP, which time and again in compulsory license settings such as this has urged the presumptive reasonableness of prior agreements reached between the parties (see PB FF/CL ¶¶ 60-61), is notably silent as to those positions here. BMI, in turn, acknowledges the rate court precedents building on those precepts, but claims they raise cautionary flags here. BMI is mistaken.

16. In the cited Showtime decision (BMI CL ¶ 215), the court's determination not to depend upon ASCAP's prior agreements within the same industry with HBO and Disney was based on (i) the experimental nature of those agreements -- not a factor here (see Willms, Tr. at 1427); and (ii) a most-favored-nations clause, also not present here. See Exhs. 14-16 and 21.

17. Similarly unhelpful to BMI (see BMI CL ¶ 216) is the court's observation in the Buffalo Broadcasting case that the local television stations' prior ASCAP fees were, if anything, over-inflated by reason of the monopoly power exercised by ASCAP and the resulting limited licensing options faced by the stations. Buffalo Broadcasting, 1993 WL 60687 at *44 (PB Exh. 3X). BMI can scarcely avail itself of that argument here; the only constraint which operated on BMI in reaching the terms it did in 1992 was its judgment as to the limited upside potential of pursuing a CRT proceeding -- a reasonable conclusion given BMI's low market share and the fact that, per-percentage-point-of-music-use, its fees were in line with those agreed to by ASCAP.

18. Neither are we here faced with prior ASCAP or BMI license fees with the Public Broadcasters that are interim in nature, rendering the quoted language from the Buffalo Broadcasting rate case cited to by BMI inapposite. See BMI CL ¶ 217.

19. In a further effort to diminish the significance to be afforded the parties' own prior agreements, both ASCAP and BMI distort, and take out of context, recent statements by the Register of Copyrights in the Digital CARP Final Rule. See ASCAP CL ¶¶ 62-63; BMI CL ¶ 213. The Register did not determine in that proceeding

that, as a general matter, the parties' prior agreements should be given no "probative value" in the rate-setting process (ASCAP CL ¶ 62); rather, the unique facts surrounding the prior license agreement upon which the CARP Panel relied in setting digital performance rights fees called into question the use of that particular license as a proper benchmark.

20. Among the problems cited by the Register in relying on that particular license as a benchmark were that: (i) the agreement at issue could not have been a license for a right to perform sound recordings "because no such legal right existed at the time of the negotiations" (Digital CARP Final Rule, 63 Fed. Reg. at 25,401); (ii) "the recognition from the audio service that a performance right in sound recordings should exist" clearly affected the level of fees to which the "rightholders" were willing to agree (id. at 25,402); and (iii) the agreement expressly provided that the stated rate would "be superseded" and thus rendered null and void "if Congress establishes a performance right in sound recordings" -- which in fact occurred (id. at 25,403).

21. It bears noting that, despite the criticism of the Panel for relying solely on the particular prior license at issue in that proceeding, the Register ultimately relied upon that very license agreement as a benchmark in

setting fees. See Digital CARP Final Rule, 63 Fed. Reg. at 25,410 ("Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination . . . .").

22. ASCAP and BMI also fail to place the Register's comments concerning the non-precedential nature of the agreement in context. As a full reading of the relevant paragraph shows, the Register's conclusion that the agreement lacked precedential value was based on a provision in the agreement which specified "that the rate will be superseded if Congress establishes a performance right in sound recordings." Id. at 25,403. In other words, the Register concluded that the agreement lacked precedential value because it provided that the actual fee at issue would become null and void on the occurrence of an event -- the enactment of legislation -- which had, in fact, transpired. No such parallel can be drawn to the voluntary license agreements at issue here, which provide for specific fees for a pre-existing right.

B. The Balance Sought to Be Preserved by the Copyright Law

23. BMI provides, at best, a partial statement of the purposes of the copyright system when it cites a single sentence form the Supreme Court's opinion in Harper & Row v. The Nation, 471 U.S. 539 (1985) as elucidating the

"rationale for the copyright law." BMI FF ¶ 54. On cross-examination, Mr. Baumgarten concurred that the following, more complete conceptualization, "is an accurate statement" of the "balance" intended by the Copyright Act:

> Our nation's scheme of copyright protection, deriving from Article I, Section 8 of the United States Constitution, and from a succession of copyright law enactments, most recently the 1976 Copyright Act, is designed to encourage creativity by offering limited protection to literary and artistic expression, thereby assuring "contributors to the store of knowledge a fair return for their labors." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985). Accord Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
>
> At the same time, however, as this Court has observed, the privileges granted by copyright "are neither unlimited nor primarily designed to provide a special private benefit." Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984). Rather, the public interest in access to information and knowledge must be properly accommodated. Id.
>
> A delicate balance must, therefore, be struck between protecting the works of copyright owners and permitting later artists and authors to build upon these works. Both interests are fundamental to the purpose of copyright.

Baumgarten Tr. at 463-66 discussing PB Exh. 10X at 8.

C. Section 118 Permits the Public Broadcasters' Two-Stage Approach to Fee-Setting

24. As fully discussed earlier (see PB FF/CL ¶¶ 22-27), the Public Broadcasters urge the Panel initially to set a fee reflecting the combined value of the ASCAP and BMI repertories and thereafter to divide that fee as appropriate between ASCAP and BMI.

25. Despite the fact that the Copyright Office has already ruled that the Public Broadcasters' proposed approach is well within the contemplation of § 118 (subject, of course, to this Panel's determination as to whether to adopt it (PB FF/CL ¶ 24)), ASCAP and BMI maintain that it is somehow legally impermissible. ASCAP miscites the 1978 CRT Decision in support of this contention (ASCAP CL ¶ 20, citing Copyright Royalty Tribunal Final Rule, 43 Fed. Reg. 25,068 at 25,068-70 (1978)(the "1978 CRT Decision")), while BMI relies on inapposite legislative history.

26. The CRT did not speak to, let alone opine as to the impropriety of, the two-stage fee-setting approach proposed here. It stated merely the following:

> The CRT, after study of section 118 and its legislative history, has concluded that it has wide discretion in determining the structure of the rate schedule, and providing for different treatment of copyright owners or public broadcasting entities on the basis of reasonable distinctions rooted in relevant considerations. The CRT has also determined that it has the authority, which it has chosen to exercise, to

> establish separate schedules of rates for the repertory of certain performing rights licensing associations.

1978 CRT Decision, 43 Fed. Reg. at 25,068 (emphasis added).

27. In the factually disparate setting there presented (BMI and SESAC having reached voluntary agreements, with ASCAP alone litigating), the CRT determined that the BMI and SESAC agreements "provided limited guidance in the disposition of the more important issues presented in this proceeding." 1978 CRT Decision, 43 Fed. Reg. at 25,068. Specifically, the CRT stated that the BMI agreement "neither in its structure or rate of royalty payment was of assistance . . . in establishing a royalty schedule for the repertory of [ASCAP]" because it was "subject to an adjustment related to the ratio of performances of BMI music to total performances of copyrighted music." 1978 CRT Decision, 43 Fed. Reg. at 25,068-69. In other words, "[i]t would be the equivalent of traveling in a circle for the CRT to now utilize the BMI agreement as the basis for establishing a reasonable royalty schedule for the use of ASCAP music" because BMI's fee was adjustable based on the total payments for music to be made by the Public Broadcasters. 1978 CRT Decision, 43 Fed. Reg. at 25,069.

28. The CRT's reasoning is neither apposite to the proposal presented here, nor, in any event, intended to

represent anything other than the exercise of the CRT's discretion in that particular instance.

29. BMI seeks to undermine the two-step fee-setting process by reference to the legislative history of § 118, essentially restating arguments earlier presented by ASCAP to the Copyright Office. BMI CL ¶¶ 223-225 and Baumgarten references cited therein. See also Order in Docket No. 96-6 CARP NCBRA at 6-8 (Dec. 9, 1997).

30. BMI's suggestion that Congress's adoption of the House version of § 118 supports its position is meritless. What occurred through the amendment process was, purely and simply, a modification of the procedure by which compulsory license fees would be paid by public broadcasters. The Senate bill called for fees to be tendered by the Public Broadcasters to the Copyright Office, pursuant to one or more fee schedules determined by negotiation or by the former Copyright Royalty Tribunal, against which claims would be made by interested copyright owners. S. Rep. No. 94-473 at 16 (1975) (ASCAP Exh. 4). The House version (which was adopted as the present § 118) provided that, in the case of failed negotiations, the CRT would determine the appropriate fees payable to copyright owners, following which payments would be made directly to the copyright owners by public broadcasters. H.R. Rep. No.

94-1476 at 117-19 (1976) (ASCAP Exh. 5). This change was dictated by the interest in avoiding unnecessary administrative costs associated with the government's disbursing of royalties so collected and bears no relationship to the fee-setting at issue here. If the Panel were to set a collective fee and apportion it between the parties, then the Copyright Office or the CARP would not be required to collect and disburse the fees or otherwise contravene any of the concerns addressed through the amendment process. At the end of the day, ASCAP and BMI will have the "individual rates" to which they are entitled under § 118, and they will receive them directly from the Public Broadcasters -- both as dictated by (and entirely consistent with) § 118.

D. Section 118 Does Not Require that Separate Rates Be Determined for Public Radio and Public Television

31. Both ASCAP and BMI ask the Panel to set separate fees for public television and public radio. BMI CL ¶ 220-222; ASCAP FF ¶¶ 257-258. The parties have never in their voluntary dealings apportioned the fees paid by the Public Broadcasters to ASCAP and BMI in this way, the 1978 CRT decision did not do so, and the performing rights organizations have provided no testimony as to why such

bifurcation is called for now. 1978 CRT Decision, 43 Fed. Reg. 25,068; PB Exhs. 11-16, 21.

32. BMI offers for the first time in its proposed findings two asserted justifications for setting a separate fee for radio and television which carry little force. First, BMI argues that 37 C.F.R. §253.4, which sets forth rates for the use of music by NPR and PBS stations which is not licensed by ASCAP and BMI, somehow requires the separate rates it seeks. BMI CL ¶ 221. But the cited rate schedule is totally non-comparable in prescribing per-composition fees to be paid by individual broadcasters to disparate copyright owners for specific uses of music. Here, where we are dealing with all-encompassing blanket license arrangements carrying forward practice where separate value has never been ascribed to radio versus television, and indeed where television music data has been used by all parties as a proxy for total music use, there is no rational basis for, or need to, artificially break a unitary blanket license fee into two pieces.

33. Neither has BMI demonstrated that separate radio and television fees are required in order to ensure that composers are fairly compensated. See BMI FF ¶ 221. Again, there is no record evidence to support such claim; it is evident that ASCAP and BMI have heretofore found adequate

means to compensate the copyright owners they represent without an express allocation by the parties of a radio versus television portion of the agreed-upon license fees.

34. Solely in the event the Panel should determine that an apportionment between public television and public radio is required, the Public Broadcasters submit that the proper allocation is seventy-five percent for public television and twenty-five percent for public radio. These percentages correspond to those set forth by Congress, which directs CPB to allocate seventy-five percent of federal public broadcasting funds to public television, and twenty-five percent to public radio, after deduction of CPB administrative expenses and System Support. 47 U.S.C. §§ 396(k)(3)(A)(i)(III)-(IV), 396(k)(3)(A)(ii)-(iii).

E. Terms and Conditions of Licenses

35. In each of their proposed findings of fact, ASCAP and BMI set forth proposed license terms concerning two non-price aspects of the compulsory license -- music use reporting obligations and the timing of payments. See ASCAP FF ¶ 76; ASCAP Written Dir. at Proposed License; BMI FF ¶ 4, Appendix A. ASCAP and BMI have failed to present any evidence as to why imposition of terms which would (i) drastically increase the music use reporting obligations which have previously applied to public broadcasting

stations pursuant to the parties' voluntarily negotiated license agreements and (ii) change the payment schedule that has prevailed in the industry, are warranted.

36. Under the Public Broadcasters' 1993-1997 license agreement with ASCAP, individual PBS and NPR stations were obligated to provide music use information for no more than one week per year and a further industry-wide limitation was agreed to which limited ASCAP to requesting information from no more than 20 percent of the public stations in a given year. See PB Exh. 13 at ¶ 4(b).

37. BMI's 1993-1997 license agreement places no affirmative reporting obligation on individual public stations. See PB Exh. 16 at ¶ 4. It requires only PBS and NPR, upon request, to "make reasonable efforts to assist BMI in collecting, regarding a reasonable number of . . . stations, such information as may normally be maintained by such stations and that is relevant to [BMI's music use information requirements]." PB Exh. 16 at ¶ 4. And, like the ASCAP license, BMI was further limited to seeking assistance from PBS with respect to no more than "two PBS television stations in any month or a second time as to the same PBS television station in any eighteen-month period; and in no case shall such information for any one request

cover a period greater than seven consecutive days per station." PB Exh. 16 at ¶ 4(b).

38. Consistent with the principle that the prior agreements between the parties form the best starting point for setting rates and terms in this proceeding, the non-price terms and conditions contained in those agreements should be the presumptive starting point for the Panel's consideration. Neither ASCAP nor BMI presented evidence demonstrating the unreasonableness of the prior provisions or changed circumstance warranting increasing the burdens placed upon the Public Broadcasters. (We note that neither ASCAP's "no precedent" language, nor the "confidentiality" provisions contained in the BMI agreement, applies to the terms and conditions in issue.) Since ASCAP's and BMI's proposed reporting obligations concerning individual stations have not been shown to be warranted, the terms and conditions relating to music reporting in the prior agreements should be continued.

39. Similarly, ASCAP and BMI would require the Public Broadcasters to pay fees semi-annually (see ASCAP Written Dir., Proposed License at § 253.3(c); BMI FF, Appendix A, 253.3(c)) whereas, under the Public Broadcasters' prior agreements, fees were paid annually in arrears at the end of each license year. (See PB Exh 13 at

¶ 3(a); PB Exh. 16 at Confidential Agreement at 1.) No evidence has been adduced by ASCAP or BMI as to why this economically disadvantageous change for the Public Broadcasters warrants implementation. The previously agreed-to annual payment schedule should be left in place.

II. ASCAP'S AND BMI'S ATTACKS ON THE PUBLIC BROADCASTERS' FEE-SETTING METHODOLOGY

40. While ASCAP and BMI both challenge the presumptive starting point of the Public Broadcasters' fee proposal -- the parties' own prior negotiated agreements -- neither contests the notion of adjusting from the appropriate starting point for changed circumstances (Boyle, Tr. at 1713; Landes, Tr. at 3350, 3354; Willms, Written Dir. at 28-29, Tr. at 1276-77) and neither fundamentally challenges the data on which Professor Jaffe relies in performing that adjustment. Professor Jaffe's testimony concerning the optimal factor by which to measure changed economic circumstance -- programming expenditures -- thus stands unchallenged, as do his data reflecting such change between 1992 and 1996. Similarly, Professor Jaffe's music use calculations stand unchallenged by ASCAP (which has adduced no overall music use data) and, to the extent overlapping as to BMI's own music use data (i.e., insofar as Professor Jaffe's data measure total minutes of music use),

are conceded by BMI to be "about the same" as BMI's own analysis. BMI FF ¶ 136.

A. Looking to the Parties' Own Prior Agreements As Presumptively Reasonable Benchmarks

41. The legal authority -- grounded in § 118 and relevant CARP and rate court decisions -- supporting prima facie reliance on prior agreements reached by the parties to this proceeding is elsewhere reviewed. See PB FF/CL ¶¶ 12-21; ¶¶ 3-22 supra.

42. ASCAP and BMI nonetheless argue that the fact that the parties are here engaged in a dispute somehow constitutes evidence that the prior agreements they entered into could not have represented fair value. See ASCAP CL ¶ 61; BMI FF ¶¶ 197, 203. The logic of this argument suggests that any time any party to a prior agreement determines that it is no longer satisfied with its terms, such dissatisfaction renders the terms of the prior agreement unreasonable. This, of course, cannot be the case. At the time the prior agreements were entered into, they reflected the terms that willing buyers and willing sellers agreed to. They were, by definition, reasonable as of that time. While the Public Broadcasters agree that it is appropriate to examine changed economic and music use circumstances since that time to determine if those same

license terms remain reasonable, the suggestion that present disagreement means they never were is untenable.

43. ASCAP also levels criticism at reliance on prior license fee levels because they assertedly fail to reflect such benefits afforded by the blanket license as unlimited access to ASCAP's repertory and indemnification. See ASCAP FF ¶¶ 186-189. The complete answer to this argument is found in one of Judge Conner's rate court decisions, in which it is observed that all of the features cited by ASCAP, by definition, were incorporated in the prior blanket licenses whose value was negotiated over and agreed upon between the parties. All that is left to determine is the proper measurement of changed circumstance. See Boyle, Tr. at 3234 (discussing Network Opinion (ASCAP Exh. 20)).[2]

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2. In an apparent effort to blunt the jurisprudential recognition that ASCAP's and BMI's blanket licensing practices reflect considerable market power and have effectively eliminated price competition (see PB FF ¶¶ 54-56), ASCAP and BMI tout the blanket license as an "efficient" means of administering music performing rights which has been warmly embraced by users. BMI FF ¶ 28; ASCAP FF ¶ 186. The record will reflect that this is not the case. Complaints about the performing rights organizations' blanket licensing practices led to the commencement of criminal and civil antitrust actions against them by the Department of Justice in the 1930's and 1940's, culminating in the entry of consent decrees which have governed ASCAP's and BMI's blanket licensing activities for five decades, and have ensured music users the availability of alternative forms of licenses. See generally Reimer, Tr. at 214-56; PB (continued...)

44. BMI contends that one cannot rule out the possibility that the prior fee levels represented a "voluntary subsidy" which did not reflect fair value to BMI's members. BMI FF ¶¶ 12, 120. From this non-record-based surmise, BMI argues that, since no other programming inputs similarly "subsidize" the Public Broadcasters, it would be unreasonable to perpetuate the fee levels of the past.

45. BMI's argument suffers numerous shortcomings. First and foremost, the record refutes any suggestion that there has been a "subsidy" -- voluntary or otherwise -- of the Public Broadcasters by ASCAP or BMI in the past. See PB FF/CL ¶¶ 180-182. Posturing by a negotiator to the effect that BMI was sensitive to the special circumstances of public broadcasting (see BMI FF ¶ 194-204) no more constitutes evidence that twenty years of fees over four

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2. (...continued)
FF/CL ¶ 55. The fact that the blanket license has been the subject of antitrust challenge by, inter alia, the commercial broadcast television networks (see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), remand sub nom. Columbia Broadcasting System, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980), cert. denied 450 U.S. 970 (1981) (ASCAP Exh. 23)); local television stations (see Buffalo Broadcasting Co., Inc. v. ASCAP, 744 F.2d 917 (2d Cir. 1984), cert. denied 469 U.S. 1211 (1985) (ASCAP Exh. 24)); and cable program services and system operators (see National Cable Television Ass'n, Inc. v. Broadcast Music, Inc., 772 F.Supp. 614 (D.D.C. 1991)) plainly reflects user dissatisfaction with it.

agreements represented a subsidy than do statements by public broadcasting's negotiators that they were sensitive to the needs of BMI's composers constitute evidence that BMI was overpaid.

46. BMI supplies no record support for the contention that the Public Broadcasters pay at commercial levels for all other programming inputs. The only evidence that even relates to this matter is found in the TCAF Report, which observes as of 1983 that, in fact, other creative inputs to public broadcasting were priced at levels below those paid by commercial entities. See PB Exh. 12X at III(D)(1).

47. Finally, there is no record evidence that composers represented by ASCAP or BMI have ever complained about the fees they have received on account of the performance of their music on public broadcasting outlets. Even BMI's chosen composer witness, Mr. Bacon, acknowledged that he decides on public television projects exclusively on the basis of the up-front fees he can negotiate, not on back-end performing royalties, which are not "a significant factor." Bacon Tr., at 1636; BMI FF ¶ 202. Composers such as Mr. Bacon are, moreover, always free to negotiate performing royalties directly with the producers with which they deal, in the event they determine they are not being

adequately compensated through BMI's royalty arrangements with the Public Broadcasters. There is no evidence that any such composers have chosen to directly license in this fashion; Mr. Bacon specifically has not done so. Bacon, Tr. at 1632-33.

B. The Prior ASCAP Agreements

48. ASCAP's principal challenge to the Public Broadcasters' fee proposal is that the "no precedent" language of paragraph 3(b) of ASCAP's prior license agreements with the Public Broadcasters precludes the Panel from giving any consideration to these agreements in fulfilling its rate-setting task. ASCAP's argument in this regard has been responded to in the Public Broadcasters' Proposed Findings, which demonstrate: the "no precedent" language has no such preclusive impact on its face and most likely was intended simply to prevent the parties or a court from being bound by the terms of the license at a future date; ASCAP's interpretation is belied by the parties' own reliance on these prior agreements as the starting point for all of their negotiations; and nothing in the language of paragraph 3(b) precludes the use of the agreement in a three-party proceeding such as this to determine the overall value of the ASCAP and BMI repertories combined. The Panel is therefore entitled to afford these agreements such weight

as it deems appropriate in setting reasonable fees payable to ASCAP and BMI in this proceeding. See PB FF/CL at ¶¶ 184-191.

49. The cases cited by ASCAP in support of its assertion that principles of contract law bar reliance on the prior negotiated agreements are inapposite. See ASCAP CL ¶ 57. At issue in those cases were the very different matters of whether one of the parties to a contract could be estopped from challenging: (i) the very existence of an agreement (Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976)); (ii) the other party's authority to enter into the agreement (Two Men and a Truck/Int'l, Inc. v. Two Men and a Truck/Kalamazoo, Inc., 949 F. Supp. 500 (W.D. Mich. 1996)); or (iii) whether they could be bound by an agreement they claimed not to have read (Villani v. New York Stock Exchange, Inc., 348 F. Supp. 1185 (S.D.N.Y. 1972)). Here, there is no question that a binding agreement existed between ASCAP and the Public Broadcasters; the parties merely dispute the meaning of one of the clauses of that agreement. ASCAP's proffered case law has no bearing on that issue.

50. The fact that paragraph 3(b) of the 1987 agreement contained certain additional language to the otherwise comparable language of paragraph 3(b) of the 1982

agreement (see ASCAP FF ¶ 284) fails to undermine Ms. Jameson's assertion that this clause was viewed by the Public Broadcasters as "boilerplate." Paragraph 3(a) of the 1982 agreement set forth fees which increased in each year of the license term, and provided that, if CPB's federal appropriations increased beyond expected levels, the fees would be adjusted upward for inflation. See PB Exh. 11. In contrast, because paragraph 3(a) of the 1987 agreement provided for identical fees in each year of the license term, it is evident that there was no need for that agreement to include the inflation adjustment language that was contained in the prior agreement. The language added to the "no precedent" clause in the 1987 agreement, it is apparent, simply related to these factual differences. That portion of paragraph 3(b) of the 1987 agreement which bears on the fees actually set forth in the agreement remained unchanged "boilerplate" from the 1982 agreement.

51. ASCAP's reference to statements made by its counsel to the CRT in 1987 concerning the significance of "non-precedential" language contained in ASCAP's agreements with different users from PBS and NPR (see ASCAP FF ¶ 285) is of no relevance here. Whatever significance ASCAP and/or the parties to those agreements ascribed to the provisions there at issue (and not in evidence here) has no bearing on

the significance of such language to ASCAP's agreements with NPR and PBS. If anything, that ASCAP did not direct the CRT in 1987 to the non-precedential language of the "voluntary agreement" it had just entered into with PBS and NPR as to which it was "most happy," suggests, as Ms. Jameson so testified, that this clause was of "no consequence" to the parties. See PB Exh 23X; Jameson, Written Reb. at 3; Boyle, Tr. at 1845. Finally, the suggestion that Mr. Koenigsberg's statement to the CRT somehow constitutes "authority" for precluding the Public Broadcasters' use of the 1992 fee here finds no support in the cited precedent.

52. ASCAP attempts, in the alternative, to discredit these prior negotiated agreements as the product of a decades-long charitable instinct towards the Public Broadcasters, resulting in fees (based on ASCAP's present view of the true "value" of the licenses) many millions of dollars below the market value of the licenses. The implausibility of this posture, as a matter of fact, economics and simple common sense, has been examined at PB FF/CL ¶¶ 206-208. Several additional observations are necessitated by ASCAP's post-hearing submission.

53. The principal vehicle for ASCAP's attack on the reliability of the prior agreements as a fair market benchmark in this proceeding is the testimony of Hal David.

While Mr. David's credentials and reputation as a songwriter are unquestionable, his knowledge (let alone memory) of the facts and circumstances surrounding the prior negotiated ASCAP-Public Broadcaster agreements is another matter. Mr. David had virtually no recall of any of the specific facts or circumstances surrounding the Public Broadcasters' negotiations with ASCAP, which is not surprising given that he had, at most, a limited role in the 1982 negotiations and did not attend any of the bargaining sessions, and had absolutely no involvement of any kind in the parties' 1987 and 1992 negotiations. Neither did Mr. David refresh his recollection by reviewing any contemporaneous minutes or the like with respect to any of the prior negotiations. It is notable that ASCAP chose to rely upon the essentially hearsay testimony of Mr. David as to the supposed understandings of the parties rather than calling to the stand Bernard Korman, ASCAP's general counsel and chief negotiator in connection with these prior agreements, or Fred Koenigsberg (currently a partner in the White & Case firm), who was an active participant in the 1987 and 1992 negotiations. See David, Tr. at 3049-78.

54. In the circumstances, carefully crafted and highly ambiguous written testimony the likes of: "[o]ur understanding was that the fees agreed upon were not the

true value of the blanket license"; "[i]f the non-precedential language had not been included, I do not believe ASCAP would have agreed to the other terms of the license"; "ASCAP did not press for what its management and Board of Directors believed to be the full value to Public Broadcasters of the ASCAP blanket licenses extended to them"; and "[t]his attitude was, I am informed, not concealed from the representatives of Public Broadcasters" simply forms no basis for diminishing, let along disregarding entirely, the force of fifteen years of uncoerced, arm's-length agreements approved by ASCAP's management, Law and Licensing Committee, and Board of Directors. David Written Reb. at 5-9.

55. Even if ASCAP did view the fees it negotiated with the Public Broadcasters as reflecting less than fair value, there is no record evidence that the Public Broadcasters agreed to terms with the same understanding. To the contrary, Ms. Jameson, who was responsible for overseeing the 1987 and 1992 negotiations on PBS's behalf (and who either attended or was briefed as to all meetings), testified that the fees agreed to were the product of normal, arm's-length business negotiations, and reflected "an accord that all the parties felt was fair or we wouldn't have reached agreement." Jameson, Tr. at 3572-73.

56. It is rare indeed, at the end of any hard-fought negotiation, that the respective parties believe they achieved all that they sought -- in Mr. David's words, that they attained "the true value" of what was bargained over. That being so, the resulting agreement stands as the best evidence of a "reasonable" outcome. David, Written Reb. at 5.

57. The issue before this Panel is not to determine fees that comport merely with ASCAP's (or BMI's) views as to "the true value" of their repertories. Rather, it is to arrive at "reasonable" fees which approximate what a willing buyer and willing seller could be expected to agree to. There is no better evidence of "reasonableness" before this Panel than the prior agreements of these very parties -- not reflecting the "true value" to each, but the acceptable value to both.

58. None of the other "economic and pragmatic" rationales ASCAP offers as proof of the below-market-value nature of its prior agreements with the Public Broadcasters is persuasive. Beyond the matters earlier cited (PB FF/CL ¶¶ 204-209), ASCAP's argumentation is at odds with Dr. Boyle's admission that, in connection with both the 1987 and 1992 negotiations, he, as ASCAP's chief economist, prepared economic proposals which were presented to the Public

Broadcasters, which proposals were in fulfillment of ASCAP's fiduciary responsibilities to its members. Dr. Boyle did not, he testified, prepare or present proposals which ASCAP believed were "unreasonably low." Dr. Boyle recalled that the fees negotiated and agreed to in 1992 "were acceptable" and that neither he nor anyone else involved in the negotiations urged ASCAP's Board of Directors to reject them as unreasonably low. Boyle, Tr. at 1840, 1852. They were in fact approved by a Board whose duty it is to assure reasonable compensation to ASCAP's members. See Rodgers, Tr. at 160-61.

C. **The Prior BMI Agreements**

59. Most of the arguments made by BMI in its post-trial submission have already been addressed by the Public Broadcasters. See PB FF/CL ¶¶ 210-226. Only a few additional points are to be noted.

60. BMI's contention that the "non-disclosure" provisions of its agreements with the Public Broadcasters "were clearly intended" to render these agreements "non-precedential" (BMI FF ¶ 179) finds no record support and is belied by the wording itself. The Public Broadcasters certainly shared no such understanding of the language. As earlier noted (PB FF/CL ¶¶ 221-226), BMI knows how to express concepts such as "non-precedential" in contract

language when it intends (and the parties with whom it is contracting agree) to do so.

61. BMI goes to great lengths to recite the indicia of its prior commercial agreements that render them, in BMI's estimation, suitable proxies for fee-setting here. BMI thus cites the fact that such agreements have been (i) market transactions, (ii) reached by mutual consent, (iii) not imposed by a court or outside party, (iv) which are the product of a long history of negotiations, (v) whose fee levels have varied over time. BMI FF ¶ 112. But as Mr. Willms conceded on the stand, each of these elements has also been present in BMI's prior dealings with the Public Broadcasters. Willms, Tr. at 1286-98. Hence, BMI's factual proffers in this regard, rather than undermine the force of BMI's prior agreements with the Public Broadcasters, serve to reinforce the propriety of relying upon those agreements as bearing the attributes of reasonableness.

62. Like ASCAP, BMI takes its fiduciary obligations seriously. Mr. Willms candidly admitted that in agreeing to the terms it did with the Public Broadcasters in 1992, BMI was reflecting the reality of a low market share and that it was unlikely it would better its result before the CRT. Willms, Tr. at 1396-98. In other words, it obtained the most it believed it feasibly could for its

composer and music publisher affiliates -- the antithesis of a "voluntary subsidy" of the Public Broadcasters.

63. Relatedly, BMI's suggestion that among the factors that prompted it to agree to the terms it did in 1992 were (i) its interest in avoiding potential embarrassment with other licensees over its low market share, and (ii) not wishing to tarnish its political image, scarcely warrants the conclusion that BMI therefore "voluntarily subsidized" the Public Broadcasters. BMI's market share entitled it to no more than it received, and BMI realized it; and its claimed concern about not appearing to take "advantage" of the Public Broadcasters was evidently a calculated one designed to enhance BMI's, not the Public Broadcasters' overall economic interests.

64. There can be no question that, as between the Public Broadcasters' licenses with ASCAP and BMI (or, indeed, with BMI alone, see PB FF/CL ¶¶ 195-198), and ASCAP's and BMI's commercial broadcasting licenses, the former constitute the more appropriate benchmark for fee-setting here. As support for the proposition that their commercial broadcast licenses are an appropriate benchmark for setting reasonable fees for the Public Broadcasters, ASCAP and BMI spent dozens of hearing hours, and now spend countless pages, attempting to show the degree to which the

commercial and public broadcasting industries are comparable as a matter of industry economics, programming, music use and various other indicia. No such postulating, hence no similar issue as to reliability of the many attempted comparisons, is entailed in examining the Public Broadcasters' own license agreements with ASCAP and BMI, covering as they do the same industry, programming and music use circumstances as are at issue in this proceeding. ASCAP itself has put it well in urging this Panel to eschew "econometric studies" (of which Dr. Boyle's and Dr. Owen's are prime examples) in favor of "actual marketplace events." ASCAP CL ¶ 38. This Panel need look no farther than "the actual market place events" which have transpired between the parties to this proceeding.

III. ASCAP'S AND BMI'S APPROACH TO FEE-SETTING

A. Evidence Of Commercialism

65. In their attempt to justify a comparison to the commercial broadcasting industry, both ASCAP and BMI greatly distort the record with respect to the commercialization of public broadcasting. In the process, they ignore or misportray the wealth of testimony from the Public Broadcasters, principally from Messrs. Jablow and Downey, concerning the vastly different economics and operations of public broadcasters as compared to their

commercial counterparts. We have earlier addressed the failure of ASCAP and BMI, in any event, to demonstrate that the factors they cite as evidence of public broadcasting's commercialism have not been present for the past ten or twenty years. See PB FF ¶¶ 168-179. Below, we address the very commercialism claims themselves.

1. The Public Broadcasters' Testimony Regarding Fundamental Differences Between Public and Commercial Broadcasting

a. Mission

66. Mr. Downey's testimony about the mission of public television makes the distinction between commercial and public broadcasting apparent:

> [Public and commercial television are] completely different undertakings. The purpose of commercial television is to gather in front of the screen the maximum number of viewers for the purpose of selling advertising. The purpose of public television lies in the program itself, rather than the number of people gathered to view it. While we are delighted when large numbers of people watch the programs we produce for mission reasons, our purpose, again, is not to reach large numbers of viewers or to compete on that playing field. The purpose instead is to insure that the program itself provides the service or the information -- the program itself is the end product, again, not however many people may watch it.

Downey, Tr. at 1961-63.

67. Mr. Jablow confirmed that the mission of public radio is likewise significantly different from that of its commercial counterparts. It is "[t]o provide programming which educates and informs, culturally enriches

the general public; quite frankly, to create a more informed public. That is our mission." Jablow, Tr. at 2364.

Continuing:

> We don't produce any program because it's commercially viable. We produce programming because we think it's in the best interest of the American public, because it's something we feel is needed and what we want to do. . . .

Jablow, Tr. at 2366-67.

b. Economics

68. The economic models on which the respective industries operate are also entirely distinct. Per Mr. Downey:

> The essential economic model that commercial television represents, is to attract the largest number of viewers to the screen at any particular time, and then to in effect, sell those viewers off in lots of 1,000 to an advertiser. So an advertiser pays a cost-per-thousand to have that advertiser's message exposed to this group of viewers. That is the sort of simple transaction, and that's where essentially, all the revenue comes from on the commercial side. On the public television side there's just no counterpart to that. Instead, public television's struggle is to raise funds from a whole variety of different sources -- not through advertising but through grants from the Federal Government, from individual contributions, from viewers like yourself, from state government, from local government, from corporations -- either in the form of underwriting grants or, you know, straightforward charitable contributions. There are manifold sources of revenue, and because life in public television is a constant struggle in terms of raising funds, we have . . . attempted to plumb every possible line of support and think of all different kinds of ways of raising funds. So the sources of revenue are widespread and numerous, but all essentially are in support of the non-commercial mission of public television.

Downey, Tr. at 1972-73. See also Downey, Tr. at 2271 ("I care that it's watched, but the objective is not simply a large viewership. If it were, there would be a different kind of programming on PBS. That should be self-evident"); at 2106-07 (in the noncommercial sector the point of the exercise "is to fund the programs; to find dollars to make programs or to make them available on one's local public television station" whereas on the commercial side "[t]he point of the programs is to bring the audience to whom to present the advertisement. And the program is the bait in that case, not the benefit"); at 2109 ("the objective isn't necessarily to attract every viewer or . . . uniformly a large numbers of viewers; the focus is on the content of the programs"); at 2271-72 ("if the objective were simply a 15 rating or a 20 rating, it would be a different kind of programming").

69. The same is true on the radio side. As Mr. Jablow explained:

> We have a whole different motivation than commercial radio. We are not in the business of making money. We are in the business of providing a service to the American public. We don't use music to make money. We play music because it's a worthwhile cultural expression. We are -- we try to most efficiently and as effectively as possible provide a service as a non-profit corporation to our member stations and to the American public that they and we serve together.

Jablow, Tr. at 2581-82.

70. Mr. Jablow stated emphatically that the economics of public and commercial radio are

> not in the least bit comparable. Commercial radio is driven by advertising dollars. Public radio is driven by its mission. It's money primarily at the station level from listeners that support it, from foundations that support it, from businesses that contribute to it, and by underwriting. At the national level, for NPR, we operate from fees that our stations pay us for the programs we provide and from corporate and foundation support. Some of that corporate support is for underwriting. But that is primarily how we operate, and I think the financial model is distinctly different, and I think the way we do business is distinctly different.

Jablow, Tr. at 2582.

71. The fundamental truth as to the significant economic differences between public and commercial broadcasting was acknowledged by ASCAP's Mr. Ledbetter who, in response to a question as to whether there are significant differences in the economics of the two media, responded: "There are significant differences, and there are significant differences in the way they're structured." Ledbetter, Tr. at 656.

c. **Funding Sources**

72. The Public Broadcasters' witnesses also testified in detail as to the variety of funding sources drawn upon to fulfill public broadcasting's mission. See PB FF/CL ¶ 166; see also PB Exh. 4; Jablow, Tr. at 2582. The evidence demonstrates that the overall mix of funding

sources has remained fairly constant over the past decade. See PB FF/CL ¶ 170. Specifically, the data show that (i) the mix of private vs. public funding has not changed dramatically over that period, and (ii) underwriting income accounts for only 15 percent of total system income. See PB Exh. 4; PB FF/CL ¶ 170; Boyle, Tr. at 1927-30 (discussing PB Exh. 4).

73. The constant challenges faced by public broadcasters to secure funding adequate to fulfill their mission has required exploring innovative techniques. As Mr. Downey testified, the history of public broadcasting has been marked by resourceful efforts to obtain funding from the most likely sources at any given time. Downey, Tr. at 1979-81. Consistent with this reality, Mr. Downey noted that the search for money from "media partners" is not reflective of any sea change in public broadcasting's orientation. Instead, "it's a way of finding new sources of revenue to assist us in making programs available, but doing it, frankly, with other people's money . . . [a]nd that is a way of enhancing, extending, broadening the service we provide, to benefit the public and the viewers." Downey, Tr. at 1980-81.

d. Underwriting Support

74. With respect to underwriting practices, Messrs. Downey and Jablow testified extensively to the fact that the FCC underwriting rules, together with PBS's and NPR's own more stringent guidelines, have the effect of distinguishing fundamentally both the process by which business support is obtained, and the content of the messages themselves, from commercial advertising practice.

75. The notion that the programming on public broadcasting has increasingly been tailored to cater to the needs of underwriters was emphatically rejected by Mr. Downey, who is the PBS executive in charge of the promulgation and enforcement of the PBS underwriting guidelines. Mr. Downey testified in detail as to the checks and balances which PBS has put in place to assure that the approximately two-thirds of all programming appearing on public television which is distributed by PBS is properly insulated from undue influence by underwriters. He explained that PBS undertakes to determine whether there is any relationship between the underwriter and the content of the program that would cause PBS to question its acceptability. See Downey, Tr. at 2304-09. With specific reference to PBS's National Underwriting Guidelines Mr. Downey described a series of tests which prospective

underwriters and their messages must meet as a prerequisite to acceptance of underwriting money and messages. See Downey, Tr. at 2304-09; ASCAP Exh. 4X.

76. Beyond these threshold editorial tests lies a series of specific rules governing the actual content of prospective underwriting messages which were explained by Mr. Downey and are described in detail in the underwriting guidelines themselves. See Downey, Tr. at 2306-13; ASCAP Exh. 4X. It is not surprising, given the stringent nature of those requirements, that large numbers of prospective underwriting messages are rejected. See, e.g., Day, Written Dir. at 18 (public television station KQED reported to reject 39 out of 40 proposed underwriting messages).

77. As Mr. Downey summarized the overall purpose and outcome of the foregoing process: "[I]n the end, the idea is to enable the company to identify itself and get fair credit for its contribution, but do so in a way that preserves the noncommercial character of public television." Downey, Tr. at 2309.

78. The acceptance of underwriting for NPR programming is governed by similar guidelines. See Jablow, Tr. at 2456-57; ASCAP Exh. 21X.

B. ASCAP and BMI Misportray the Operations of Public Broadcasting

1. ASCAP and BMI Witnesses

79. ASCAP's testimony on the issue of the "commercialization" of public broadcasting relies upon three witnesses -- James Ledbetter, Robert Unmacht and James Day -- two of whom have never been, and none of whom is currently, employed in public broadcasting. Messrs. Ledbetter and Unmacht are journalists. Mr. Day, formerly a public broadcasting executive, has not been employed in the public broadcasting industry since 1973. Day, Tr. at 1016-17. Mr. Day's employment in the public broadcasting industry thus terminated prior to the enactment of § 118 and preceded the entire history of relationships between the Public Broadcasters and each of ASCAP and BMI.

80. Mr. Ledbetter in addition brings a pronounced and admitted bias to his analysis. Ledbetter, Tr. at 634. Mr. Ledbetter (who has described his role as a critic to be to point out "what is wrong" with the subject of his criticism (ASCAP Exh. HE1 at 19)) has published a book relating to public broadcasting which reflects his own social and political agenda. One need only read the first page of that book to recognize Mr. Ledbetter's "perspective" -- as he rails against Newt Gingrich, his "Republican footsoldiers" and their purported attacks on public

broadcasting as "the communications arm of lemon socialism." Equally revealing of Mr. Ledbetter's perspective is the fact that his book is based upon an earlier Village Voice article entitled "Made Possible by . . . Why Public TV Sucks." See generally ASCAP Exh. HE1; Ledbetter, Tr. at 627-28. It is not surprising that the New York Times faulted Mr. Ledbetter's book for its "ideological bias." Ledbetter, Tr. at 634.

81. Mr. Day's written testimony is rife with inaccuracies and misstatements. See, e.g., Day, Tr. at 1034 ("A: It's obvious I was probably using two different sources and failed to make an updating of the source . . . . I don't know what the -- Q: Sitting here today do you know which, if either, is correct? A: No, I don't."); at 1034 ("Those were errors in the preparation of these figures."); at 1035 (acknowledging further error).

82. The preponderance of Mr. Day's and Mr. Ledbetter's testimony with respect to the "commercialization" of public broadcasting, along with virtually the entirety of the rest of ASCAP's proffer in this area, is drawn from newspaper articles, trade journals, Internet postings and similar sources of untested reliability. The testimony, in short, is based on hearsay and double hearsay. See, e.g., Ledbetter, Tr. at 690-91; Day, Tr. at 1012. In

assessing the probative value of such testimony, the Panel must be mindful of its origin. In weighing it against conflicting testimony of Messrs. Downey and Jablow, the first-hand knowledge of these public broadcasting executives must be given considerably greater weight than the evidence so adduced by ASCAP. See Order in Docket No. 96-6 CARP-NCBRA at 3-4 (Apr. 28, 1988) ("Of course, the Panel shall accord the weight to such documents as it deems appropriate. Counsel should be well aware that the weight accorded a document rife with hearsay is often seriously compromised where no witness is presented for cross-examination who can defend the truth or accuracy of the hearsay statements."); Tr. at 801-12 (discussion between Panel and Mr. Weiss); Griffith, Tr. at 2500; Tr. at 2516-17 (discussion between Panel and Mr. Rich).

83. For its part, BMI presented no expert testimony with respect to the operations of the public broadcasting industry, relying on the subjective impressions of a financial officer who joined BMI in the late 1980's and the videotaping impulse of one of its attorneys. See DiMona, Tr. at 1229.

84. In contrast, the Public Broadcasters' witnesses -- Peter Downey and Peter Jablow -- are both senior public broadcasting industry executives, currently

employed in public broadcasting, with nearly twenty-five years of experience in public broadcasting between them.

2. The ASCAP and BMI Evidence

85. ASCAP, in particular, grossly misportrays the day-to-day operations of public radio and television in an effort to suggest that public broadcasting is "just like" commercial broadcasting. For its part, BMI cites simplistic propositions -- such as the fact that both sets of media distribute a variety of programming to viewers and utilize music -- to achieve the same end. The record facts expose the lack of substance to both sets of arguments.

-- Allegations as to Underwriting --

86. A salient example of ASCAP's and BMI's misportrayal of public broadcasting's operations is in the area of underwriting practices. ASCAP and BMI would have the Panel ignore the Public Broadcasters' witnesses with first-hand knowledge of the subject in favor of evidence in the nature of a collection of Website material gathered by an ASCAP paralegal and otherwise unsupported opinion.

87. Based largely upon such hearsay evidence, ASCAP attempts to portray current underwriting practices as having undergone a dramatic shift which now makes the noncommercial stations' efforts to secure underwriting support no different from the sale of commercial advertising

time. However, ASCAP has offered no evidence to counter the perspective placed on such practice by Messrs. Downey and Jablow -- let alone to demonstrate the representativeness of the hearsay it relies on; the degree to which the sales staffs at the cited stations actually conform their practice to the printed words; or the degree to which underwriting activities at particular stations, let alone industrywide, have changed since 1992 or earlier. Not surprisingly, neither Mr. Downey nor Mr. Jablow was able to attest to the accuracy or representativeness of the Website collections placed before them. See Downey, Tr. at 2052, 2185-86; Jablow, Tr. at 2484, 2536

88. In any event, as Mr. Downey noted, the fact that certain stations have been utilizing Internet Web pages to publicize their underwriting practices is not evidence of a material change in industry practice in the direction of "commercialization." As Mr. Downey explained, even prior to the advent of the Internet, public broadcasting stations routinely used press kits for purposes of encouraging businesses to underwrite. Downey, Tr. at 2302. These kits had essentially the same content as the materials which purportedly appear on station web pages. Id.

89. Mr. Jablow similarly noted that underwriting is not a new phenomenon, having been sought by public radio

"from day one, since 1971. When public radio was first instituted, underwriting was a component and a significant component of need." Jablow, Tr. at 2583.

90. Certain other conclusions ASCAP would draw from the anecdotal evidence are contradicted by the record. For example, ASCAP cites to two station Web pages for its generalization that there has been an industry-wide "trend" toward stations broadcasting 30-second local corporate support announcements. ASCAP FF ¶ 118. Mr. Downey, however, specifically noted that only some two dozen stations have allowed underwriting credits as long as 30 seconds' duration. Downey, Tr. at 2075-76.

-- Allegations as to Compromise of Program Content --

91. Neither does the record support the assertion that public broadcasting has modified program content to suit the needs of underwriters. ASCAP cites to one example of funding from a U.S.-Japan foundation in relation to public radio programming, but presents no evidence to suggest that the integrity or mission of public radio was thereby compromised. Inconsistent with this premise, Mr. Ledbetter attested to NPR's journalistic integrity. Ledbetter, Tr. at 673. No more compelling is BMI's reference to one program about the history of computers underwritten by a computer manufacturer which, as with

ASCAP's example, fails to demonstrate how such underwriting support compromised the program content itself. To the extent that ASCAP's and BMI's claims are meant to suggest merely that public broadcasting develops programming of value to potential underwriters while still meeting the objectives of noncommercial television, this scarcely constitutes a basis for branding public television as blatantly commercial.

-- Allegations as to Commercial Programming Overlap --

92. Neither is ASCAP aided in its search for increased commercialism by the fact that certain cable television program fare has come to emulate public television's own programming. See ASCAP FF ¶¶ 156-157. Such evidence, if anything, underscores the leadership role and public policy interest served by public television in spurring its commercial counterparts to increase their children's and other educational and cultural programming fare. See Downey, Tr. at 1961-62, 2148.

93. ASCAP and BMI both seize on public television's reruns of the Lawrence Welk show as further evidence of commercialism. ASCAP FF ¶ 150; BMI FF ¶ 79. Their own "journal of record" in this proceeding - Current magazine - repels this notion by observing that the program has aired on public television to fill a void created by

commercial sponsors' unwillingness to carry programming catering to older viewers. Ledbetter, Tr. at 660-62; PB Exh. 13X.

-- Asserted Similarities of Commercials and Underwriting Credits --

94. ASCAP's and BMI's evidence as to the asserted similarity between commercials and underwriting credits is similarly lacking. See ASCAP FF ¶ 115; BMI FF ¶¶ 92-94. Mr. Day, on whom ASCAP relies, admitted that his conclusion in this regard was not the result of any study or other formal analysis but, instead, simply the product of "personal observation." This personal observation amounted to saying that he had "seen this more than once," but Mr. Day could not provide any specific examples. Day, Tr. at 1065-66; 1011-12.

95. BMI's evidence consists primarily of a videotape of several public television underwriting credits prepared on impulse by one of BMI's inside counsel while watching public television with his child one morning. The videotape was sponsored by BMI's chief financial officer, who could not attest to the representativeness of what it depicts in relation to what appears on public television generally, let alone how the underwriting credits depicted compare to those same entities' commercial television advertising spots. Willms, Tr. at 1228-29, 1369-71.

-- Allegations as to Public Television's General Resemblance to Commercial Television --

96. BMI's evidence as to the commercial "look" of public television overall consists of: BMI's subjective impressions as to relative "production values," without benefit of any objective study (see Willms, Tr. at 1366-67); and the mere fact that both media broadcast a wide variety of programs using a variety of music. Willms, Written Dir. at 8. But when pressed at trial for detail on such matters as the comparability of the programming mix between the commercial and non-commercial sectors, Mr. Willms conceded that BMI had undertaken no study of these matters. Willms, Tr. at 1366. While BMI also suggests that there is considerable overlap in the actual programs broadcast on commercial and non-commercial television (see BMI FF ¶ 77), Mr. Willms conceded on the stand that this is not, in fact, the case. Willms, Tr. at 1374.

97. ASCAP cites Mr. Day in support of the proposition that public television programming has become more commercially-oriented over the years. See ASCAP FF ¶ 149. This is, in fact, directly contrary to Mr. Day's testimony. See PB FF/CL ¶ 175.

-- Allegations Relating to Entrepreneurial Revenue --

98. ASCAP would make much of the fact that public broadcasting has been successful in garnering additional so-called entrepreneurial revenues over the past several years. But, as Mr. Downey testified, most of the entrepreneurial ventures which are generating additional revenue for PBS do not involve broadcast activities which result in public performances of ASCAP's or BMI's music, but instead entail revenues from such activities as home video distribution, record sales, and merchandising. As Professor Jaffe testified, there is a lack of direct connection between the revenues earned by the Public Broadcasters and the value of the music they use. Jaffe, Tr. at 2715, 1757-64. That economic reality is only underscored in relation to ASCAP's and BMI's apparent effort to latch onto non-broadcasting-related revenue streams. See Downey, Tr. at 2319; see also ASCAP Exh. 14X (PBS Annual Report).

-- Allegations as to Salary Structures --

99. Similarly non-probative is the testimony of ASCAP witness Horace Anderson, a former White & Case attorney, through whom ASCAP seeks to prove the comparability of salary structures between commercial and non-commercial broadcasting. ASCAP FF ¶ 181; ASCAP Exhs. 310, 311, 700, 701 and 721. It was shown at trial that Mr.

Anderson, who has absolutely no expertise on the topic, made numerous arbitrary assumptions in undertaking comparisons between two totally non-comparable third-party studies covering different time periods. Anderson, Tr. at 1076-99. While perhaps an interesting academic exercise, the apples-to-oranges nature of his comparison precludes drawing any meaningful conclusions. In all events, ASCAP has not demonstrated either the relevance to this case of the proffered salary comparison, or how relative salaries may have changed over time, especially as between 1992 and earlier and the present.

-- Allegations as to Pledge Drives --

100. ASCAP's assertion that pledge drives have become a national phenomenon only in recent years (see ASCAP FF ¶ 152) is contrary to the record evidence. Mr. Downey specifically testified that such activity is not a recent phenomenon. See Downey, Tr. at 2313 (Q: Are pledge drives a recent phenomenon? A: Heavens no. They go back to the 1970's).

101. ASCAP in any event glosses over the fact that pledge drives account for only a fraction of the total amount of money raised from subscribers in a given year and, by definition, an even smaller fraction of total system revenues. See Downey, Tr. at 2294-95.

102. As set forth in ASCAP Exh. 12X and confirmed by Mr. Downey on cross-examination, public television raised about $50 million dollars on account of pledge drives in 1996. Downey, Tr. at 2314-16; ASCAP Exh. 12X. (In this regard, ASCAP's claim (ASCAP FF ¶ 154) that stations earned $30-$50 million per drive in 1996 is, at best, misleading.) Pledge drive contributions thus accounted for only 15.3 percent of total contributions from members of $327,534,110 (see PB Exh. 4 setting forth 1996 membership revenues) and only 3.3 percent of total television revenues.

-- Allegations as to Budget Expansion --

103. ASCAP and BMI would have the Panel give undue weight to the fact that PBS attracted an additional $18 million for its National Program Service in 1996. See ASCAP FF ¶¶ 183-185; see also ASCAP Exh. 15X. Mr. Downey again placed the significance of these data in proper perspective. An increase in PBS production funds of $18 million amounts to only 2.6 percent of the public television system's total programming and production expenditures of about $675 million. Downey, Tr. at 2320-21. See also PB Exh. 4.

104. As for PBS's plan to increase PBS's programming budget by 50 percent by the year 2000, as Professor Jaffe testified, there is no assurance this target

will be met, and rate-setting based on unrealized projections is not a sound undertaking. Jaffe, Tr. at 3824-29. Once again, even were such goal to be realized, it would not constitute a significant portion of public broadcasting's overall annual program budget.

C. ASCAP'S AND BMI'S MUSIC USE DATA

1. ASCAP

105. The Public Broadcasters' proposed findings with respect to ASCAP's music data are set forth at PB FF/CL ¶¶ 130-138. Several additional points warrant mention in light of ASCAP's post-hearing submission.

106. ASCAP would leave the impression that the details of its survey and distribution system, upon which ASCAP's music use data in this proceeding are based, are legally mandated and the subject of extensive judicial and Department of Justice oversight and input. The system in fact essentially reflects the judgment of ASCAP's Board of Directors at any given time as to how to divide among ASCAP's members the fees ASCAP collects from its various users. Of the dozens of changes since the entry of the 1960 Order, which sets forth the various weighting rules applied by ASCAP in its royalty distributions United States v. ASCAP, Modification of Consent Decree, 1960 Trade Cas. (CCH) ¶ 69,612 (Jan. 7, 1960)), every one has been initiated by

ASCAP. Moreover, Dr. Boyle could recall only one instance of an ASCAP-initiated weighting rules change being rejected by the Department of Justice, and one instance of rejection by the rate court. Boyle, Tr. at 3127-36, 3233-43.

107. There is, in any event, no reason to conclude that the system developed by ASCAP reflects the optimal way to value performances of music for purposes of establishing fees payable by users such as the Public Broadcasters. ASCAP's assignment of "credits" to individual uses of music is expressly designed to facilitate the distribution of royalties across a broad spectrum of composers and publishers. There is no basis for concluding that these credits properly value the ASCAP license to a user. A more objective examination of music use -- measuring music cues and minutes, taking account of the types of music use measured -- offers a fairer basis to evaluate music use and music use patterns over time.

108. In apparent recognition of the weakness of its evidence on music use, ASCAP presents anecdotal evidence of music use on public television and radio stations and then proceeds to fault the Public Broadcasters for failing to address this anecdotal evidence. See ASCAP FF ¶¶ 208-241. ASCAP, however, is wide of the mark. The Public Broadcasters do not dispute that their programming makes use

of music, just like every other broadcaster. ASCAP's data reveal nothing, however, as to the nature or quantity of that use, or how it has changed over time. The Public Broadcasters' own music use data -- which is empirical, not anecdotal -- responds to these relevant issues.

2. **BMI**

109. The Public Broadcasters' proposed findings with respect to BMI's music data are set forth at PB FF/CL ¶¶ 139-43. One additional point requires discussion in light of BMI's post-hearing submission.

110. BMI claims that public and commercial television broadcasters use "about the same" amount of BMI music based upon estimates calculated by Dr. Owen as to the "percentage of program time" accounted for by BMI music in both media. In order to estimate the percentage of commercial television air time occupied by BMI music in a given year, Dr. Owen's formula compiles a number by combining information on so-called network and non-network programming to arrive at industry-wide BMI music use estimates. In order to build his final number, for each of the network and non-network universes, Dr. Owen used (i) data supplied by BMI to estimate the total number of minutes of music aired, (ii) estimates as to the total number of

programming hours aired, and (iii) an estimate supplied by BMI as to its share of total music use.

111. On cross-examination, Dr. Owen conceded that, even under his own formula, he was unable to obtain complete data for any year. This was due to various gaps in his data set. First, Dr. Owen did not obtain any data for the year 1995 respecting music use in non-network programming. All of his estimates of music use in non-network programming are derived from a study which was conducted by BMI in 1993-1994 to examine the use of BMI music in 1991 and 1992. Thus, in order to derive an estimate as to music use in 1995, Dr. Owen was forced to assume that no change occurred in music use on non-network television between 1992 and 1995 -- an assumption for which there is no record support. The missing data reflected programming accounting for about two-thirds of the total programming universe. Owen, Tr. at 1522-24.

112. In addition, while BMI provided Dr. Owen with data as to BMI's share of music used in non-network programming for the year 1992 (claiming it to be at percent based on the Lexecon study), BMI did not supply Dr. Owen with any data with respect to its music share on network programming -- for 1992 or any other year. Although Dr. Owen's written testimony did not reveal this to the

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Panel, in order to calculate BMI's overall share of commercial television music use, Dr. Owen was forced to assume that the information he was provided as to non-network programming could be applied to the network programming (with both then extrapolated forward to 1995). Other than on the weak predicate that some non-network programming includes programming which previously aired on a network, Dr. Owen was unable to provide any basis for making that assumption. (The Panel is entitled to draw a negative inference from the fact that BMI elected not to provide Dr. Owen with data regarding its percentage of music use in network programming in any year.)

113. Lastly, it should also be noted that Dr. Owen had to strain to estimate the total number of programming hours aired by network and non-network affiliates. In order to do so, he was forced to draw upon multiple sources and rely on estimates with respect to such matters as the amount of network programming hours "cleared" by network affiliates. Owen, Written Dir. at App. Tbls. 1-2. For all of these reasons, Dr. Owen's conclusion that public television and commercial television use about the same amount of music is open to serious question.

D. ASCAP's "Trending" Formula

114. ASCAP presents a "trending" formula as "reassurance" as to the reasonableness of its fee request. ASCAP FF ¶¶ 266-267. As noted by the Public Broadcasters, Dr. Boyle's trending analysis should be afforded little or no weight because the real issue in this case is what has changed since the last round of negotiations. See PB FF/CL ¶¶ 2, 63-68. Indeed, the fact that the parties did not agree in 1992 or earlier to fees at the amounts which would be dictated by ASCAP's trending formula is evidence that the formula is not indicative of the marketplace.

115. In any event, ASCAP's trending formula is arbitrary and, more importantly, is fundamentally economically flawed.

116. As set forth in ASCAP's direct case and the testimony of Dr. Boyle, ASCAP's trending formula arrives at its ultimate fee by taking the 1978 CRT fee of $1.25 million and adjusting that fee for changes in "private revenues" and music use. See ASCAP FF ¶ 266-267. The formula is set forth at Boyle, Final Rev. Written Dir. at 9-11.

117. ASCAP's trending formula results in holding constant over time the percentage of private revenues represented by ASCAP's fee in 1978. Boyle Tr., at 1928-30. In other words, by simply multiplying the 1978 fee by the

change in private revenues, with no other adjustment, ASCAP implicitly assumes that the relationship between fees and revenues should not change over time. In contrast, ASCAP's experience in commercial broadcasting demonstrates that ASCAP's fees from the commercial broadcasting industry have significantly declined over time as a percentage of revenues. Evidence as to this fact is reflected in the record of this case, which shows that ASCAP's commercial television fees in 1976 (the latest year for which the CRT had data in determining the 1978 fee) represented about percent of commercial television revenues. That figure had dropped to percent by 1995. Similarly, ASCAP commercial radio fees as a percentage of commercial radio revenues dropped by percent from percent of revenues to . percent of revenues between 1976 and 1995. PB Exh. 27X at 9; Boyle, Tr. at 1931-32; BMI Exh. 41 (Kagan data).

118. By failing to address this trend, ASCAP's trending formula makes absolutely no adjustment for a critical marketplace reality -- namely, that commercial broadcasters (and commercial television broadcasters in particular) were successful, over time, in demonstrating (both in bargaining and aided by the rate courts) that the value of the public performance rights licensed by ASCAP do not bear a constant relationship to revenues as revenues

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grow. For ASCAP's trending formula to have any validity, it must apply an equal discount factor to the fees extrapolated to be payable by the Public Broadcasters over time to that which ASCAP's commercial broadcasting licensees have experienced over that same period. By so proceeding, the effect, again consistent with logic, is to hold the fees payable by the Public Broadcasters in the same relation to commercial broadcast fees (on a percentage-of-revenue-basis) as they bore in 1978 as a result of the CRT's determination.

119. Another major shortcoming of ASCAP's trending methodology is its failure to examine changes in total revenues over time. While, as set forth in the Public Broadcasters' Proposed Findings, revenues are not as good a measure of changed circumstance as programming expenditures, see PB FF/CL ¶¶ 90-105; United States v. ASCAP; Application of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc., 157 F.R.D. 173, 197 (S.D.N.Y. 1994) (PB Exh. 4X at 55) (the "O&O Opinion") ("Magistrate Judge Dolinger properly concluded that a percentage-of-revenue formula is not an appropriate measure of the value of a blanket license because the stations' revenues are not a direct function of the ASCAP music they use."), to the extent one determines to examine public broadcasting revenues as a measure of changed circumstance, it is

appropriate to examine total, not merely so-called "private," revenues. See PB FF/CL ¶ 104. This is especially the case given that revenues received from public sources are used to pay for programming. See Jaffe, Written Reb. at n.14, Tr. at 2941-45. See generally BMI FF ¶ 122 (no reason to distinguish between public and private sources of revenue); ASCAP FF ¶ 250 (acknowledging CPB's contribution to PBS programming budget).

120. ASCAP's calculation of the growth of private, as opposed to public, revenues over a twenty-year period also significantly inflates the fee ASCAP claims it is due since private revenues have grown at a significantly faster rate than public revenues. Specifically, whereas private revenues grew by some 487 percent from $0.1734 billion to $1.0184 billion between 1978 and 1995 (the period ASCAP chose to measure), total revenues during that period grew from $0.552 billion to $1.9 billion -- or some 244 percent. PB Exhs. 4 and 27X; ASCAP FF ¶ 266; Boyle Written Dir. at App. C.

121. ASCAP's methodology further leads to an unreasonably high fee by avoiding examining music use trends on public broadcasting. ASCAP's formula narrowly focuses on changes in ASCAP " " for the period 1990-1995. Dr. Boyle concedes that, even on ASCAP's chosen measurement

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of music, this lack of data renders his fee formula incomplete. Boyle, Final Rev. Written Dir. at 11. Other, more probative data are, however, available. They reveal that ASCAP's share of music on public television programming has significantly declined over the past twenty years -- from a high of 90 percent in 1976 to a low of about percent today. See PB Exh. 27X at 49; Jaffe, Written Reb. at 23-25; BMI FF ¶¶ 158-160. If ASCAP's trending formula is to be given any weight, it must take account of ASCAP's reduced music use share, since the fee set by the CRT in 1978 necessarily reflected ASCAP's then 90 percent market share.

122. To demonstrate the unreasonableness and methodological unsoundness of ASCAP's trending formula, the Public Broadcasters have prepared an alternative trending formula, taking account of the major conceptual shortcomings addressed above. This revised calculation results in a fee that is significantly below the current ASCAP fee level. While the Public Broadcasters would urge this Panel to be leery of drawing any conclusions based upon the trending of the 1978 fee, if any version of a trending formula is to be considered by the Panel, that which we set forth in Appendix A hereto is plainly the more probative of a reasonable fee.

See Appendix A: The Public Broadcasters' Trending Methodology.

E. ASCAP's "New Trending" Formula

123. In addition to the trending formula presented in its direct case, ASCAP presents for the first time an entirely new argument in support of its fee proposals based upon an adjustment of the 1978 fees to account for changes in the number of stations and CPI. See ASCAP FF ¶ 265. This additional argument should be rejected for several reasons.

124. First, ASCAP presents this argument for the first time in its Proposed Findings without having provided any record support for it. Despite the fact that ASCAP clearly had an opportunity to present such a methodology during this proceeding, it did not do so. The methodology has not been sponsored by an economist (or anyone else) or subjected to the crucible of cross-examination. Indeed, no evidence has been adduced by any party in this case in support of the proposition that changes in public broadcasting combined station growth and CPI since 1978 forms a reasonable basis for fee-setting here. ASCAP's belated methodology is untimely and should be given no weight.

125. To the extent ASCAP's proposal represents a sub silentio attempt to apply its own version of a fee-setting methodology adopted by Magistrate Dolinger for adjusting fees in the Buffalo Broadcasting rate proceeding, see Buffalo Broadcasting, 1993 WL 60687 at *43-44 (PB Exh. 3X), the effort also falls short on numerous grounds.

126. First, Magistrate Dolinger's formula was based upon analysis of a twenty-three day trial record which focused on the economic and operating circumstances of the commercial local television stations before the court. The Court did not purport to state a methodology of general applicability irrespective of the nature of the applicants before the rate-setting tribunal.

127. In developing the formula, the Court had significant data before it concerning the manner in which that industry had grown, enabling the Court to make findings as to the degree that newer stations were representative of pre-existing ones. See Buffalo Broadcasting, 1993 WL 60687 at *44 (PB Exh. 3X) ("[N]ewly licensed [television] stations are not likely to be representative of the entire group of licensed stations in several characteristics that are relevant to fee setting. Thus, for example, they may well have a shorter broadcast day . . . and they are likely to have a smaller audience."). The Court tailored a formula to

deal with those facts. Thus, the Court determined that change should be measured solely by one-half the percentage increase in stations in any given year.

128. In this case ASCAP has presented no evidence concerning the relative size, length of broadcast day, use of music, economic scale or anything else among the multitude of public radio and television stations that have come on the air since 1978. While treating all stations alike benefits ASCAP's newly-minted formula, the void in the record as to these matters renders ASCAP's approach meaningless.

129. ASCAP's new methodology is further flawed because it too fails to take into account the decline in ASCAP's music share on public television. As discussed above, ASCAP's share has declined by percent over the past twenty years. See ¶ 121, supra.

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CONCLUSION

130. For the reasons set forth herein, and in the Public Broadcasters' Proposed Findings of Fact and Conclusions of Law, the reasonable value to the Public Broadcasters of the ASCAP and BMI repertories combined for the five-year period 1998-2002 is $20.2 million.

131. The foregoing sum should be divided between ASCAP and BMI in such manner as the Panel deems appropriate.

Respectfully submitted,

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APPENDIX A

The Public Broadcasters' Trending Methodology

(Offered Solely in Rebuttal To ASCAP's Trending Methodology)

1. In contrast to ASCAP's trending formula, the following trending analysis carries forward the fee awarded by the CRT in 1978 taking into account (i) changes in total public broadcasting revenues; (ii) the fact that the percentage of revenues accounted for by ASCAP license fees has declined over time in the commercial broadcasting industry; and (iii) the fact that ASCAP's share of music use on public television has declined. The Public Broadcasters' analysis begins with revenue information for the year 1976 (versus ASCAP's 1978), since 1976 was the last year for which the CRT had data in establishing a fee. See PB Exh. 27X at 9.

2. The decline in ASCAP's license fees as a percentage of commercial broadcasting revenues between 1976 and 1995 may be computed as follows:

1976:

Television

ASCAP Commercial TV Fees: $42.9 million[1]

Total Commercial TV Revenues: $5.2 billion[2]

ASCAP Fees as a Percentage of Revenues: 0.83 percent

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1. PB Exh. 27X at 9.

2. Id.

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Radio

ASCAP Commercial Radio Fees: $24.4 million[3]

Total Commercial Radio Revenues: $2.0 billion[4]

ASCAP Fees as a Percentage of Revenues: 1.22 percent

1995:

Television

ASCAP Commercial TV Fees: $ million[5]

Total Commercial TV Revenues: $32.5 billion[6]

ASCAP Fees as a Percentage of Revenues: percent

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3. Id.

4. Id.

5. ASCAP FF ¶ 247.

6. See BMI Exh. 41 (Kagan revenue estimates). The Public Broadcasters have relied upon estimates of commercial television and radio broadcasting revenues as reported by Paul Kagan & Associates (as opposed to ASCAP's Commerce Department data) because Kagan is a widely recognized source which is relied upon in the commercial broadcast industry and, apart from this proceeding is viewed by (and has been retained by) ASCAP as an expert in the field. See PB Exh. 28X at 10-11; Boyle, Tr. at 1897, 1900-02.

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Radio

ASCAP Commercial Radio Fees: $ million[7]

Total Commercial Radio Revenues: $11.4 billion[8]

ASCAP Fees as a Percentage of Revenues: percent

3. As these data reflect, ASCAP's fees have declined as a percentage of revenues as follows:

Commercial Television: 0.83% to % = % decline

Commercial Radio: 1.22% to % = % decline

4. For purposes of this analysis, the $1.25 million fee awarded by the CRT can be allocated between public television and public radio, in a manner consistent with Dr. Boyle's approach. Using total revenues in 1976 as the basis for allocation (as opposed to private revenues in 1978) yields the same result as Dr. Boyle's calculation, as follows:

Total Public Broadcasting Revenue: $412.1 million[9]

Total PTV Revenue: $361.4 million[10] = 88% of Total

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7. ASCAP FF ¶ 248.

8. BMI Exh. 41.

9. PB Exh. 27X at 29, Table 9.

10. Id.

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Total Public Radio Revenue: $50.7 million[11] = 12% of Total

Yielding Disaggregated Fees as follows:

Public Television: 88% of $1.25 million = $1.1 million

Public Radio: 12% of $1.25 million = $0.15 million

5. Over the period 1976-1995, public television's revenues rose from $361.4 million to $1.464 billion. See PB Exhs. 4 and 27X. Over the same period, public radio revenues rose from $50.7 million to $453.1 million. See PB Exhs. 4 and 27X.

6. Applying Dr. Boyle's formula, before taking into consideration ASCAP's commercial fee experience and changes in ASCAP's music share, yields fees as follows:

Television = $1.1 million * (1,464.0/361.4) = $4.46 million

Radio = $0.15 million * (453.1/50.7) = $1.34 million.

7. These totals must then be adjusted to take into account the fact that ASCAP's license fees declined % as a percentage of commercial television revenues (from 0.83% to %) and % as a percentage of commercial radio revenues (from 1.22% to %) over the 1976-1995 period. As reflected below, when this fact is taken into consideration, it yields a total fee to ASCAP of $ million as of 1995:

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11. Id.

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Public Television:

$4.46 million * % = $ million

Public Radio:

$1.34 million * % = $ million

Total Fee = $ million

8. This fee requires further adjustment to take into account the fact that ASCAP's market share on public television has declined precipitously over the measured period. In particular, the original CRT fee was based upon evidence which suggested that ASCAP's share of music use on public television was approximately 90% in 1976, whereas the unrebutted evidence in this proceeding from both the Public Broadcasters and BMI indicates that ASCAP's current share is at about %. See Owen, Written Reb. at 3; BMI FF ¶¶ 158-160. Since ASCAP's music share has dropped by % (from 90% to %) the proper adjustment is from $ million to $ million.

9. As these figures indicate, a properly constructed trending analysis yields a fee as of 1995 which is significantly lower than the $2.99 million fee payable under the 1993-1997 license agreement, and percent below the result suggested to be reasonable by Dr. Boyle.

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